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COURT TERMINATES POLLUTION ENFORCEMENT ACTION AS AGAINST CANADIAN SUBSIDIARY OF CHEVRON

By Jack D. Coop

On January 20, 2017, the Ontario Superior Court of Justice released a summary judgment decision in the case of *Yaiguaje v Chevron Corporation*, terminating a civil claim by Ecuadorian plaintiffs against Chevron Canada Limited ("**CCL**"). That judgment has now been released to the public, and may be found here.[1]

The decision is an important one to environmental lawyers, particularly given the recent growth of interest by governments in encouraging corporate social responsibility by companies operating extractive industries on foreign soil.[2]

Background

In 2013, the plaintiffs obtained an Ecuadorian judgment for US $9.5 Billion against the parent company, Chevron Corporation. The judgment arose out of alleged pollution caused by Chevron Corporation in Ecuador. When the Plaintiffs were unable to enforce their claim in Ecuador (insufficient assets) or the U.S. (claim dismissed as unenforceable in the U.S. and fraudulent), they attempted to do so in Canada, against CCL, a "seventh level indirect subsidiary" of the parent.[3]

An earlier motion by CCL to dismiss the action, as unenforceable in Canada, went all the way to the Supreme Court of Canada. The Supreme Court ruled the Ontario courts had jurisdiction to consider the Ecuadorian enforcement action, but made it clear that its ruling was without "prejudice [to] future arguments with respect to the distinct corporate personalities of Chevron [Corporation] and Chevron Canada".[4]

CCL promptly brought a motion for summary judgment to dismiss the action as against CCL, on the basis of the "distinct corporate personalities" of the parent and subsidiary. The parent company brought a companion motion seeking the same relief. For the purpose of this motion, the parties apparently assumed that there would be an enforceable US $9.5 Billion judgment against Chevron Corporation.[5]


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[1] *Yaiguaje v Chevron Corporation*, 2017 ONSC 135 ("**Decision**").

[2] See, for example, Global Affairs Canada's "Enhanced Corporate Social Responsibility Strategy to Strengthen Canada's Extractive Sector Abroad", at: http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/rse.aspx?lang=eng.

[3] Decision, paras. 5-18.

[4] Ibid., paras. 19-20.

[5] A fact that will only be finally determined at the trial of this matter.

Summary Judgment Decision

In granting judgment dismissing the action as against CCL, the court made the following important rulings:

1. **Corporate Separateness**. The court accepted that, on all the evidence, the two corporations are separate legal entities, and declined to pierce the corporate veil to permit enforcement against the subsidiary. In fact, the court took the unusual step of repeating and adopting all of the findings of fact of the original Superior Court decision that was appealed to the Supreme Court.[6]

2. **Execution Act**. The court accepted the moving party's submissions that Ontario's *Execution Act* is an essentially procedural statute and does not empower the plaintiffs to execute their judgment a subsidiary, since the parent company had no right or interest in the shares and assets of the subsidiary:[7]

> [37] The *Execution Act*, which is a procedural statute, does not create any rights in property but merely provides for the seizure and sale of property in which a judgment-debtor already has a right or interest. It does not establish a cause of action against Chevron Canada. Chevron Canada is not the judgment-debtor under the Ecuadorian judgment and, therefore, the *Execution Act* does not apply to it with respect to that judgment. The *Execution Act* does not give Chevron any right or interest, equitable or otherwise, in the shares or assets of Chevron Canada.

Furthermore:

> [47] A plain reading of the *Execution Act* makes it clear that it does not create any substantive rights that override or supplant the long-established principle of corporate separateness.

3. **Corporate Veil**. The court further declined to pierce the corporate veil and hold the subsidiary liable for the debt of the parent, on any of the grounds advanced by the plaintiffs. Specifically, it ruled that:[8]

   - The two companies "are separate legal entities with separate rights and obligations. The principle of corporate separateness has been recognized and respected since the 1896 decision of the House of Lords in *Salomon v. Salomon & Co*";[9]
   - Shareholders are not liable for the obligations of the corporation, and the assets of a corporation (subsidiary) belong to the corporation, not the shareholders." As a result,

[6] Decision, paras. 26-30.
[7] Ibid., paras. 31-49.
[8] Ibid., paras. 50-73.
[9] Ibid., para. 58.

Chevron [Corporation, the parent] does not have any legal or equitable interest in the assets of Chevron Canada as an indirect shareholder seven-times removed."[10]

- Moreover, the claim by the plaintiffs "against Chevron Canada for its shares cannot succeed because its shares do not belong to Chevron Canada."[11]
- The plaintiffs were not permitted to pierce the corporate veil based on "fraud or improper conduct" in creating the corporate entity of Chevron Canada, per the *Transamerica* line of cases, because "they cannot establish wrongdoing akin to fraud in the corporate structure between Chevron [Corporation] and Chevron Canada";[12]
- In law, there is no "independent "just and equitable" exception to the principle of corporate separateness as the plaintiffs suggest. This is not a basis for piercing Chevron Canada's corporate veil in this case."[13]
- There was no basis for finding Chevron Canada liable for debt of the parent "on a theory of enterprise group liability", per the *Teti* decision, since the two companies did not work in common as a single business entity, and Chevron Canada had no involvement in Ecuador;[14]
- Finally, the court accepted the earlier analysis of the Superior Court that the corporate veil could not be pierced because the subsidiary was not a "puppet" of the parent:

  [73] The evidence does not establish that Chevron Canada is Chevron's "puppet". Rather, I find that Chevron and Chevron Canada have a typical parent/subsidiary relationship. Chevron does not exercise complete dominance or control over the affairs of Chevron Canada...

Motion by Plaintiffs to Strike Defence of Parent Corporation

The court's decision also deals at length with a motion by the plaintiffs to strike out, pursuant to Rule 21, paragraphs in the Statement of Defence of Chevron Corporation, on the basis that it "plain and obvious" the pleaded defences could not succeed.[15] It is beyond the scope of this article to address the court's many rulings on the plaintiffs' motion to strike. Suffice it to say, this motion was largely unsuccessful.

That such a motion was heard at all by the court underscores the fact that the summary judgment motions did not end this action in its entirety. The action against Chevron Corporation lives on, with the plaintiffs apparently intent on obtaining a judgment against the parent company in Canada, regardless whether or not that judgment is enforceable against its subsidiary.

Conclusion

[10] Ibid., para. 60.
[11] Ibid., para. 61.
[12] Ibid., paras. 63-65.
[13] Ibid., paras. 66-68.
[14] Ibid., para. 70.
[15] Paras. 76-119.

The decision of the Superior Court granting summary judgment against the plaintiffs in this environmental enforcement action is legally an important one, both from the perspective of fundamental principles of corporate law, as well as environmental corporate social responsibility.

Canada's extractive sector may be breathing a collective sigh of relief. However, the comfort this decision provides to Canadian subsidiaries may be short-lived. The plaintiffs have already served a notice of appeal and will seek to have the Court of Appeal set aside many of the lower court rulings noted above. It is safe to say that we have not heard the end of the Chevron case.